

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE SANDS,

Plaintiff,

- against -

CBS INTERACTIVE INC.,

Defendant.

Case No. 18-cv-07345 (JSR)

ECF Case

ANSWER OF DEFENDANT CBS INTERACTIVE INC.

Defendant CBS Interactive Inc. (“CBS Interactive”), by its undersigned counsel, Cowan, DeBaets, Abrahams & Sheppard LLP, hereby answers the complaint of plaintiff Steve Sands (“Plaintiff”) in this action dated August 14, 2018 (“Complaint”), as follows:

NATURE OF THE ACTION

1. CBS Interactive states that the allegations contained in Paragraph 1 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1, and therefore denies the same, except admits that this action purports to arise under the Copyright Act and seeks only monetary relief, and that this action involves photographs that Plaintiff claims to own. CBS Interactive admits that it used, on its website www.gamespot.com (the “Website”), photographs of actors John Bernthal and Deborah Ann Woll on the set of Netflix’s *The Punisher* television series (the “Photographs”) but denies that it has infringed Plaintiff’s copyrights or that Plaintiff is entitled to any relief.

JURISDICTION AND VENUE

2. CBS Interactive states that the allegations contained in Paragraph 2 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, admits that the claim purports to arise under the Copyright Act, and as such this Court would have subject matter jurisdiction.

3. CBS Interactive states that the allegations contained in Paragraph 3 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, admits that it maintains a place of business in New York, New York and that it is therefore subject to personal jurisdiction in this district.

4. CBS Interactive states that the allegation contained in Paragraph 4 is a conclusion of law as to which no responsive pleading is necessary, but to the extent any response is required, admits that venue is proper in this district.

PARTIES

5. CBS Interactive denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 5, and therefore denies the same.

6. CBS Interactive admits the allegations contained in Paragraph 6.

STATEMENT OF FACTS

A. Background and Plaintiff's Ownership of the Photographs¹

7. CBS Interactive denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 7, and therefore denies the same.

¹ To the extent this Section Heading of the Complaint contains factual allegations or legal conclusions, CBS Interactive denies each and every such allegation and conclusion.

CBS Interactive further states that the photographs attached to the Complaint as Exhibit A speak for themselves and denies any mischaracterization thereof.

8. CBS Interactive states that the allegations contained in Paragraph 8 are conclusions of law to which no responsive pleading is necessary, but to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 8, and therefore denies the same.

9. CBS Interactive denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 9, and therefore denies the same, but states that the purported copyright registrations referenced, and the records attached to the Complaint as Exhibit B speak for themselves and denies any mischaracterization thereof.

B. Defendant's Infringing Activities²

10. CBS Interactive admits that, on or about October 7, 2016, it published an article on its Website entitled "*New Punisher Images Reveal Return of Key Daredevil Character*," at the URL referred to in Paragraph 10, but denies that the Photographs were featured "prominently." CBS Interactive further states that the images attached as Exhibit C to the Complaint speak for themselves and denies any mischaracterization thereof.

11. CBS Interactive admits that it neither licensed the Photographs from Plaintiff nor obtained Plaintiff's permission or consent to publish the Photographs on its Website but denies that its use of the Photographs constitutes copyright infringement for the reasons stated herein.

12. CBS Interactive denies the allegations contained in Paragraph 12 and states that the cases cited by Plaintiff only demonstrate the fact that Plaintiff is litigious, denies that CBS

² To the extent this Section Heading of the Complaint contains factual allegations or legal conclusions, CBS Interactive denies each and every such allegation and conclusion.

Interactive engaged in any copyright infringement in those cases, and states that CBS Interactive was never held liable, and both cases were resolved.

FIRST CLAIM FOR RELIEF

13. CBS Interactive incorporates by reference each response to the allegations in Paragraphs 1 through 12 of the Complaint.

14. CBS Interactive states that the allegations contained in Paragraph 14 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 14, except admits that it does not, and has never had, a license to use the Photographs, but denies that it needed a license or other authorization to use the Photographs.

15. CBS Interactive states that the allegations contained in Paragraph 15 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 15.

16. CBS Interactive states that the allegations contained in Paragraph 16 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 16.

17. CBS Interactive states that the allegations contained in Paragraph 17 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 17.

18. CBS Interactive states that the allegations contained in Paragraph 18 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 18.

19. CBS Interactive states that the allegations contained in Paragraph 19 are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, CBS Interactive denies the allegations contained in Paragraph 19.

PRAYER FOR RELIEF

Plaintiff's Prayer for Relief does not necessitate responsive pleading, but CBS Interactive denies that Plaintiff is entitled to any of the relief sought therein.

DEFENDANT CBS INTERACTIVE'S AFFIRMATIVE DEFENSES

CBS Interactive makes the following allegations as affirmative defenses against the claims asserted against it without admitting that it bears the burden of persuasion or presentation of evidence on each or any of these matters, and without waiving the right to assert and rely upon other defenses that become available or appear during the course of this action.

FIRST AFFIRMATIVE DEFENSE

1. Upon information and belief, Plaintiff's copyright registrations are defective and invalid, and Plaintiff accordingly has no standing to sue for copyright infringement, let alone seek statutory damages or attorney's fees.

SECOND AFFIRMATIVE DEFENSE

2. Upon information and belief, Sands does not own the copyrights or, at very least, the asserted exclusive rights for some or all of the Photographs.

THIRD AFFIRMATIVE DEFENSE

3. To the extent any copyright has been infringed, which CBS Interactive denies, CBS Interactive's actions were innocent and non-willful, and Plaintiff fails to identify any facts supporting its allegations of willfulness, including as set forth in Paragraph 16 of the Complaint, all of which allegations are made solely "upon information and belief." Further, once CBS

Interactive became aware of Plaintiff's claim, CBS Interactive removed the Photographs from its Website.

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff's claims are barred by the doctrine of fair use under 17 U.S.C. § 107 because the story was about the Photographs, themselves (*see* Complaint, Exhibit C ("New Punisher Images Reveal Return of Key Daredevil Character")), and therefore CBS Interactive's use of the Photographs constitutes protected "comment" and/or "news reporting" expressly referenced in 17 U.S.C. § 107.

FIFTH AFFIRMATIVE DEFENSE

5. To the extent any copyright has been infringed, which CBS Interactive denies, Plaintiff has suffered no damages, or has suffered, at most, *de minimis* damages, as the reasonable licensing fee CBS Interactive would have paid for use of the Photograph is minimal.

SIXTH AFFIRMATIVE DEFENSE

6. To the extent any copyright has been infringed, which CBS Interactive denies, Plaintiff failed to mitigate its damages, if any.

SEVENTH AFFIRMATIVE DEFENSE

7. To the extent any copyright has been infringed, which CBS Interactive denies, Plaintiff would only be entitled to an award of the statutory minimum of \$750 (to the extent that the Photographs are properly registered in the first place), as the reasonable licensing fee CBS Interactive would have paid for the Photograph is less than \$250.00, given the current licensing rate for photographs taken by Plaintiff and made available online.

EIGHTH AFFIRMATIVE DEFENSE

8. To the extent any copyright has been infringed, which CBS Interactive denies, Plaintiff is not entitled to an award of attorneys' fees under 17 U.S.C. § 505 in light of, *inter alia*, CBS Interactive's reasonable defenses.

NINTH AFFIRMATIVE DEFENSE

9. The Complaint is barred, in whole or in part, by the doctrine of unclean hands. CBS Interactive reserves the right to assert additional defenses as discovery in this case progresses.

WHEREFORE, CBS Interactive respectfully requests that this Court enter judgment in its favor and against Plaintiff, as follows:

1. Denying all relief sought by Plaintiff in the Complaint;
2. Dismissing the Complaint in its entirety with prejudice;
3. Declaring that CBS Interactive has not infringed any of Plaintiff's copyrights;
4. Finding that Plaintiff is not entitled to damages or attorney's fees;
5. Awarding CBS Interactive its costs, including reasonable attorneys' fees in accordance with 17 U.S.C. § 505; and
6. Granting all such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 18, 2018

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